

081296 APR 17 2009

120
①
No. _____

OFFICE OF THE CLERK

In the
Supreme Court of the United States

LESLEY SIMMONS ST. GERMAIN;
HILLARY ROSE HILLYER;
MELISSA BRANIGHAN LUMINAIS

Petitioners,

v.

D DOUGLAS HOWARD, JR;
D DOUGLAS HOWARD, JR & ASSOCIATES;
HOWARD & REED, ATTORNEYS AT LAW

Respondents.

*On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit*

PETITION FOR WRIT OF CERTIORARI

MARK EDW. ANDREWS
Counsel of Record
ANDREWS ARTS & SCIENCES LAW, LLC
7104 COLISEUM STREET
NEW ORLEANS, LA 70118-4818
MEA@MEALAW.COM
504-865-8191

Attorney for Petitioners

QUESTIONS PRESENTED

1. To avoid Rule 12(b)(6) dismissal of a civil RICO complaint, is the standard of pleading a "criminal act" standard, heightened above the plausibility standard?

2. Must civil RICO plaintiffs file a complaint pleading the same heightened level of fact, before discovery, as would be available to the government after a criminal investigation?

3. In an alleged civil RICO mail and wire fraud scheme pleading the specific circumstances of the fraud, where the fraudulent scheme is additionally alleged to violate state law governing attorney conduct, where three plaintiffs allege direct economic damage from a continuing pattern of a scheme perpetrated by a RICO person and a RICO enterprise, is the civil RICO complaint properly dismissed under Rule 12(b)(6) because it fails to allege "predicate criminal acts"?

4. Where a civil RICO complaint is dismissed under Rule 12(b)(6) four months after filing, the complaint has never been amended, no responsive pleading has been made, and plaintiffs express an intent to amend, is amendment under Rule 15(a) properly denied with no analysis or finding of undue delay, dilatory motive, undue prejudice, repeated failure, or futility, but rather because plaintiffs filed a RICO case statement as required by a RICO standing order and filed a memorandum in opposition to a motion to dismiss?

RULE 14.1(B) STATEMENT

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Plaintiffs-Appellants and Petitioners:

Lesley Simmons St. Germain is a natural person of majority and resident of New Orleans, Louisiana.

Hillary Rose Hillyer is a natural person of majority and resident of New Orleans, Louisiana.

Melissa Branighan Luminais is a natural person of majority and resident of Jefferson Parish, Louisiana.

Defendants-Appellees and Respondents:

Desmond Douglas Howard, Jr., Attorney at Law, is a natural person of majority maintaining a professional office in New Orleans, Louisiana, and being admitted to practice in Louisiana, Bar. No. 7021.

D. Douglas Howard, Jr., and Associates, is a law firm of unknown structure, not registered with the Louisiana Secretary of State.

Howard and Reed, Attorneys at Law, is a law firm of unknown structure, having offices in New Orleans and Covington, Louisiana, not registered with the Louisiana Secretary of State. Former names of the law firm are Howard, Reed and Taylor, and Howard, Laudumiey, Mann, Reed & Hardy.

TABLE OF CONTENTS

Questions Presented	i
Rule 14.1(b) Statement	ii
Table of Contents	iii
Table of Authorities	v
Opinions Below	1
Jurisdiction	1
Statutory Provisions Involved	2
Statement of the Case	2
Controlling Precedent	10
Reasons for Granting the Petition.	11
I. The Fifth Circuit's "criminal act" pleading standard conflicts with the civil RICO statutes, the decisions of this Court, and other circuit courts.	11
A. The Fifth Circuit imposed a heightened pleading standard in excess of Rules 8 and 9(b).	11
B. The Fifth Circuit's demurring to apply the plausibility standard here conflicts with the Seventh Circuit.	12
II. The Fifth Circuit's dismissal of a civil RICO action alleging mail and wire fraud, which additionally alleged violations of rules and state law regulating attorneys, conflicts with the civil RICO statutes, the decisions of this Court, and other circuit courts.	14

A.	The Fifth Circuit's decision here conflicts with part III-C of <i>Bridge</i> , and the consistent line of prior decisions referenced therein.	14
B.	The Fifth Circuit's holding that an alleged civil RICO violation is categorically not actionable where it also implicates rules regulating attorneys conflicts with the Eighth Circuit. .	15
III.	The Fifth Circuit's rule formulaically justifying denial of amendment as of right conflicts with Rule 15(a), the decisions of this Court, and other circuit courts.	15
A.	The Fifth Circuit's opinion here has already been used as precedent for denial of amendment in a later decision.. . . .	16
B.	The Fifth Circuit's rule here conflicts with the Seventh and Third and, apparently, with all other circuits.. . . .	17
IV.	Categorical dismissal of civil RICO actions against attorneys justified by reference to state rules or state laws regulating attorneys will lead to different results under different states' rules and laws.	17
Conclusion	. . . . .	18
Appendix A, Circuit Court Opinion	. . . . .	1a
Appendix B, District Court Order	. . . . .	6a
Appendix C, District Court Judgment	. . . . .	7a
Appendix D, RICO Standing Order	. . . . .	8a
Appendix E, Relevant Statutes	. . . . .	12a

TABLE OF AUTHORITIES

CASES

<i>Anza v. Ideal Steel Supply Corp.</i> , 547 U.S. 541, 126 S.Ct. 1991 (2006)	2
<i>Arthur v. Maersk, Inc.</i> , 04-3670 (3rd Cir. 1/13/2006) 434 F.3d 196	17
<i>Bell Atlantic Corp. v. Twombly</i> , 550 U.S. 544, 127 S.Ct. 1955 (2007).	12, 13
<i>Bridge v. Phoenix Bond & Indemnity Co.</i> , 553 U.S. ___, 128 S.Ct. 2131 (2008)	10, 13, 14
<i>Erickson v. Pardus</i> , 551 U.S. 89, 127 S.Ct. 2197 (2007) (<i>per curiam</i>)	12
<i>Foman v. Davis</i> , 371 U.S. 178, 83 S.Ct. 227 (1962)	15, 16
<i>Foster v. Deluca</i> , 05-1491 (7th Cir. 9/29/2008) 545 F.3d 582	17
<i>Handeen v. Lemaire</i> , 95-3679 (8th Cir. 5/7/1997) 112 F.3d 1339 . .	14, 15
<i>Limestone Development Corp. v. Village of Lemont, Ill.</i> , 07-1438 (7th Cir. 4/1/2008) 520 F.3d 797 . .	12, 13
<i>Price v. Pinnacle Brands, Inc.</i> , 97-10623 (5th Cir. 4/22/1998) 138 F.3d 602 . . .	16
<i>St. Germain v. Howard</i> , 08-30364 (5th Cir. 1/20/2009) 556 F.3d 261. . .1,	9
<i>The Torch Liquidating Trust v. Stockstill</i> , 08-30404 (5th Cir. 2/23/2009)	16

FEDERAL STATUTES

18 U.S.C. §1341 (2008)	2, 14
18 U.S.C. §1343 (2008)	2, 14
18 U.S.C. §1346 (2008)	2, 6, 15
18 U.S.C. §1961 (2006)	2, 12
18 U.S.C. §1962 (2006)	2, 13
18 U.S.C. §1964 (2006)	2, 13
28 U.S.C. §1254(1) (2007)	1
28 U.S.C. §2101(c) (2007)	1

RULES

Federal Rule of Civil Procedure 8.	12
Federal Rule of Civil Procedure 9(b)	12
Federal Rule of Civil Procedure 12(b)(6)	12
Federal Rule of Civil Procedure 15(a).	15, 16

STATE CASES

<i>D. Douglas Howard, Jr. v. Lesley Simmons St. Germain, Hillary Rose Hillyer nee Smith, Melissa Branighan Luminais, Mark Edw. Andrews, Andrews Arts & Sciences Law, LLC, and David E. Simmons, DDS, 2009-2267, Civil District Court, Orleans, LA</i>	5
<i>Husk v. Blancand, 155 La. 816, 99 So. 610 (1924)</i>	5
<i>Leenerts Farms, Inc. v. Rogers, 421 So.2d 216 (La. 1982).</i>	5
<i>Walker v. State, 817 So.2d 57 (La. 2002)</i>	5

PETITION FOR WRIT OF CERTIORARI

Lesley Simmons St. Germain, Hillary Rose Hillyer, and Melissa Branighan Luminais, Plaintiffs—Appellants in the civil RICO action below, respectfully petition for a writ of certiorari to review the opinion and judgment of the U.S. Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Fifth Circuit, *St. Germain v. Howard*, 08-30364 (5th Cir. 1/20/2009) 556 F.3d 261, is a published opinion, and is reproduced at Appendix A, 1a-5a.

The Order of the U.S. District Court for the Eastern District of Louisiana in case number 07-9040, dated 5 March 2008, and Judgment dated 6 March 2008, are reproduced at Appendices B and C, 6a-7a.

The RICO Standing Order routinely entered in civil RICO cases in the Eastern District of Louisiana, ordered by that court *en banc* on 3 June 1987, and entered in the instant case on 27 November 2007, is reproduced at Appendix D, 8a-11a.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Fifth Circuit sought to be reviewed was entered on 20 January 2009. This petition is timely under 28 U.S.C. §2101(c) and Supreme Court Rule 13.1 because it is being filed within 90 days of the entry of the opinion and judgment sought to be reviewed. This Court has jurisdiction to review the judgment of the U.S. Court of Appeals for the Fifth Circuit pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions involved are 18 U.S.C. §§ 1961, 1962, 1964, 1341, 1343, and 1346, which are reproduced at Appendix E, 12a-15a.

STATEMENT OF THE CASE

“Judicial sentiment that civil RICO’s evolution is undesirable is widespread”¹ is an observation providing a useful framework for understanding this case.

The three Petitioners here filed a civil RICO complaint against their common former divorce attorney, alleging the following facts.

The three Petitioners here, as civil RICO Plaintiffs and Appellants below, are three former clients of a divorce attorney in New Orleans. In a continuing pattern making use of the mails and wires, commencing in 2005 for one, in 2006 for another, and in 2007 for the third, Plaintiffs allege that they were fraudulently overbilled in a variety of specified ways, fraudulently billed by an unauthorized law firm, subjected to extortionate threats of the Defendant attorney’s abrupt withdrawal, subjected to the Defendant attorney’s actual abrupt and unlawful withdrawal, and—in total—inadequately represented in their divorces as a result of the Defendants’ fraudulently taking their money but failing to perform.

Although Defendants are in exclusive control of much evidence and knowledge, including exactly how their two law firms are constituted and connected, Plaintiffs were able to assemble and append to their Complaint thirty pages of documentary evidence—proving that mailings were sent, money was billed and

1. *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 541 (2006) (THOMAS, J., concurring in part and dissenting in part).

paid, contracts with unlawful provisions were signed, unlawful abrupt withdrawals were perpetrated, and showing or proving other aspects of the alleged mail and wire fraud scheme.

Plaintiffs alleged the exact dates, senders, recipients, and contents of mailings in paragraphs 27, 31, and 35 of the Complaint (R.12). The various fraudulent contents of the mailings were specified in other paragraphs, grouped according to the various provisions of state law violated by different facets of the alleged scheme.

Plaintiffs alleged in paragraphs 40 and 54 of the Complaint (R.13&17), and elsewhere, that Defendants performed "unauthorized and/or overbilled work" in order to run up the bills, and in paragraphs 55-57 (R.17) alleged specific examples of improperly-billed work.

Plaintiffs were able to both allege and prove in the Complaint one small but nevertheless fraudulent aspect of Defendants' scheme, in paragraph 42 of the Complaint (R.14), and with proof in Exhibits P-2, P-3, and P-5. Using mailed billings, Defendants collected ten (\$10) dollars per month per victim as overhead fees from Plaintiffs without even having a supposed contractual authority to do so.

In preparing their civil RICO action, Plaintiffs examined the case files of the extensive litigation that Defendant attorney had habitually brought against clients and former clients in state court, where Defendant attorney practices and is well known. Such case files contained copies of contracts having unlawful provisions on their faces, and other evidence that Defendants' fraudulent actions constituted a long-standing continuing pattern. A list of Defendant attorney's lawsuits against his clients was made Exhibit P-1 to the civil RICO Complaint (R.33).

The three clients signed contracts of employment for legal representation with those contracts clearly naming a specific law firm. Those contracts are attached as Exhibits P-2, P-4, and P-7 to the Complaint (R.34-36,39-41,&51-54). The three clients were subsequently billed by— and paid money to— a different law firm than the one named in the contract. The bills were sent by U.S. Mail. Sample bills are attached to the Complaint as Exhibits P-5 and P-8 (R.42-49,&55-59).

Plaintiffs, as clients of Defendant attorney, received by U.S. Mail billing statements either instructing the payment of money or purportedly justifying the debiting of money from an already-paid retainer fee. Not all, but some of the aspects of the larger fraudulent scheme are visible on the faces of the mailings which are attached to the Complaint in this case. The face of the billing statements show (1) that money was being billed by, and paid to, a law firm which was not authorized to take any money from Plaintiffs, (2) an overhead fee was being charged, and (3) the overhead fee was arbitrarily ten (\$10) dollars per month per client more than was even purportedly allowed under the contracts. The certified mailing of 21 November 2006, Exhibit P-6 to the Complaint (R.50), shows on its face that Defendant attorney improperly abruptly withdrew from representation of one of the Plaintiffs, which is a violation of state substantive law. Defendant's unlawful withdrawal from representation of another Plaintiff is shown on the face of a motion to withdraw, Exhibit P-3 to the Complaint (R.37-38), which was filed in court, with a copy sent to Plaintiff by U.S. Mail.

The three clients were unaware at the time of each others' contracting with the attorney, and were only vaguely aware of their rights secured by the Rules of

Professional Conduct regulating attorneys and having the force and effect of substantive law in Louisiana². After analysis, Plaintiffs were prepared to allege, and did allege, that Defendants' actions were not mere technicalities or mistakes, but were fraudulent actions which also violated state substantive law.

Defendant attorney's extensive history of litigation against his own clients made it evident that Plaintiffs and their attorney would be sued and harassed in retaliation for filing their Complaint. The Defendant attorney did in fact file a defamation suit against the civil RICO Plaintiffs and their attorney on 3 March 2009 during the preparation of this Petition.³

As Plaintiffs pointed out to the Fifth Circuit panel at oral argument, the civil RICO Complaint was prepared and filed with the certainty that the Defendant would bring retaliatory satellite litigation, and Plaintiffs therefore appended a large amount of proof to their Complaint. The perceived threat of retaliatory litigation also caused Plaintiffs to consider the wording of their Complaint very carefully—trying to state a case sufficient under the statute and precedent without overstating the case.

Plaintiffs filed a RICO Case Statement on 19 December 2007 as required by the district court's RICO Standing Order entered in this case on 27 November 2007. The RICO Standing Order, Appendix

2. *Walker v. State*, 817 So.2d 57, 60 (La. 2002) citing *Leenerts Farms, Inc. v. Rogers*, 421 So.2d 216 (La. 1982) and *Husk v. Blancand*, 155 La. 816, 99 So. 610 (1924).

3. *D. Douglas Howard, Jr. v. Lesley Simmons St. Germain, Hillary Rose Hillyer nee Smith, Melissa Branighan Luminais, Mark Edw. Andrews, Andrews Arts & Sciences Law, LLC, and David E. Simmons, DDS*, 2009-2267, Civil District Court for the Parish of Orleans, Louisiana, filed 3 March 2009, pending.

E, 8a-11a, has no indication of having been modified or updated since being ordered by the district court sitting *en banc* on 3 June 1987— twenty years before the instant case was filed— and consequently elicits a larger amount of information about immediate post-*Sedima* concerns and less about present concerns such as the Fifth Circuits extremely-heightened pleading standard. Plaintiffs' RICO Case Statement followed the outline dictated by the RICO Standing Order, and consequently contained the information elicited and omitted information not elicited.

Plaintiffs consented to an extension of time to respond, and Defendants filed a Rule 12(b)(6) motion to dismiss and for sanctions on 6 February 2008. Plaintiffs filed an opposition to the motion to dismiss on 25 February 2009 and asked for oral argument. Plaintiffs attached copies of four public records to their opposition for the purpose of rebutting Defendants' *res judicata* arguments, but did not try to improperly bolster their case with any new evidence, since the introduction of new evidence is not allowed in an opposition. In the written opposition, Plaintiffs indicated their intent and ability to amend.

In written opposition (R.508), as acknowledged by the district court at oral argument (R.665-67, Tr.50:13-52:2) Plaintiffs pointed out that not only was the alleged scheme fraudulent in a number of particulars, but that the totality of the scheme amounted to a deprivation of honest services under 18 U.S.C. §1346, Justifying Plaintiffs' contention that all of their money taken by Defendants should be recovered as damages.

The district court heard oral argument on 5 March 2008. During argument, the court asked (at R.461-62, Tr.26:19-27:3):

How does any of that equate to criminal fraud? That's my question. Can you explain that to me[?] Whether it violates the code of professionalism or the code of professional responsibility, if it does or doesn't, but assuming even if it does, how does that equate to criminal fraud? Remember, we're not talking about just a legal malpractice claim here. We're talking about civil RICO based on allegations that have to amount to criminal mail fraud under the criminal federal mail fraud statute. How does any of that amount to criminal mail fraud?

The district court also observed (at R.463, Tr.28:1-5):

Again, as I said, I'm not a big fan of that way of practicing law, frankly, but we're here talking about whether this equates in any way to a criminal act, and I just don't see it. I'm giving you a chance to convince me why this should survive a motion to dismiss.

At oral argument, Plaintiffs again identified their intent and ability to make a first amendment before responsive pleading to the Complaint. (R.656, Tr.41:16-20.)

At the conclusion of oral argument on 5 March 2008 the district court dismissed Plaintiffs' civil RICO claims with prejudice, dismissed Plaintiffs' pendant state law claims without prejudice, denied Defendants' motion for sanctions, and denied leave to amend. A minute entry was made that day, and was revised the next. A judgment was entered the next day on 6 March 2008.

In stating its reasons, the district court stated (at R.667, Tr.53:3-10):

Again, while it may be that the plaintiffs have at least a colorable argument that the defendants engaged at different times in different conduct which may or may not have violated provisions of either the code of professionalism or the code of professional responsibility, I don't believe that any of the conduct alleged in this case could in any way amount to federal mail fraud or wire fraud or a violation of the civil RICO statute based upon mail or wire fraud.

In reasons for denying amendment, the district court stated that the Complaint, RICO Case Statement, and written opposition had been three opportunities to make a best case, and then stated (at R.673, Tr.58:12-18):

I'm convinced that the plaintiffs have stated their best case. They've had three opportunities to do so. I think it would be pointless at this time to allow an amendment to the complaint, which is effectively what the RICO case statement does, gives you effectively a better chance to state your claim. So for those reasons, I'm going to deny leave to amend the complaint.

The decision here notwithstanding, where the RICO Case Statement was filed 49 days before the motion to dismiss, it was impossible to address in the RICO Case Statement any valid points in the motion to dismiss. Plaintiffs here had no more information on 19 December 2007 when the RICO Case Statement was due than they had on 20 November 2007 when they filed their Complaint. Therefore, the RICO Case Statement provided no meaningful opportunity to amend the Complaint, and does not generally provide such an amendment opportunity for civil RICO plaintiffs.

Petitioners are unaware of authority beyond the Fifth Circuit for treating a Rule 12(b)(6) opposition memorandum as an amendment itself.

Plaintiffs timely appealed to the Fifth Circuit as Number 08-30364. The Fifth Circuit panel heard oral argument on 3 December 2008 and filed a published per curiam opinion on 20 January 2009 (at 1a-5a).

The Fifth Circuit held “[b]ecause Appellants have not alleged the requisite predicate *criminal acts* under RICO, they have not met the pleading standard of Rule 12(b)(6)” (emphasis in the published opinion, at 3a).

The Fifth Circuit holds the following is not a cognizable civil RICO claim: allegation of the use of the mails and wires—with specific dates, senders, recipients, content, and fraudulent content, with documents appended—in furtherance of a fraudulent scheme perpetrated against three victims in overlapping succession, also violating several provisions of state law, such allegations factually supported by copies of contracts showing violations of state law on their faces, by copies of withdrawals showing violations of state law on their faces, by copies of billing statements showing recurring charges violative of state law on their faces, and by copies of documents showing the simultaneous use of multiple different law-firm identities, which is violative of state law.

Furthermore, under this precedential Fifth Circuit decision, the Rule 15(a) first amendment before responsive pleading as of (former) right is not available to plaintiffs who have filed a RICO Case Statement and a memorandum in opposition, with no discussion or consideration of undue delay, prejudice, futility, or any other factor formerly required to overcome the former presumption that amendment should be allowed.

The Fifth Circuit has created a fork with which to pitch most civil RICO complaints out of court: the civil complaint must meet an extremely-heightened ill-defined criminal-act standard, but it effectively may not be amended. The instant opinion has already been cited by the Eastern District of Texas and the Western District of North Carolina regarding the pleading standard, and by the Fifth Circuit regarding amendment.

CONTROLLING PRECEDENT

This Supreme Court has long observed that civil RICO has been put to use far beyond the harrying of movie mobsters, with such expanded use being warranted by the language of the legislation and this Court's consistent pronouncements since 1985. This Court has long observed that mail or wire fraud is a very common basis for civil RICO claims, that civil RICO does provide a federal-jurisdiction hook for otherwise state-law actions, and that the many jurists who disfavor civil RICO are instructed not to look outside of the statute and controlling precedent for new ways to limit its availability. This Court's recent unanimous decision in *Bridge v. Phoenix Bond and Indemnity Co.*⁴, which was released during the pendency of the appeal at issue here, makes clear that narrowing constructions of RICO, and judicial elimination of the private action, are not to be allowed.

There are remarkably few reported cases involving civil RICO complaints against attorneys related to their practice of law, as opposed to business dealings outside of legal practice. In drafting their Complaint, Plaintiffs were not able to identify any case from any circuit suggesting that a civil RICO claim against an

4. *Bridge v. Phoenix Bond & Indemnity Co.*, 553 U. S. ____ (2008).

attorney had requirements different in any respect from other civil RICO claims. The leading case on-point is now the instant case, which teaches that in the Fifth Circuit it is impossible for any civil RICO suit against an attorney to be sustained if a state has adopted rules of professional conduct for attorneys or equivalent state law, because necessarily any attorney wrongdoing will be a simultaneous violation of state law to be litigated in the state courts.

REASONS FOR GRANTING THE PETITION

In the published opinion at issue here, the Fifth Circuit (1) requires “predicate criminal acts”— not indictable, not chargeable, not punishable, but criminal acts— to be alleged and apparently proven in order to avoid dismissal of a civil RICO complaint, (2) finds that a complaint (a) specifically alleging use of the mails and wires in furtherance of a scheme which also (b) violated several provisions of state law, to be categorically not actionable under civil RICO, and (3) limits and nearly eliminates the availability of amendment for these and future civil RICO plaintiffs.

- I. The Fifth Circuit’s “criminal act” pleading standard conflicts with the civil RICO statutes, the decisions of this Court, and other circuit courts.**
- A. The Fifth Circuit imposed a heightened pleading standard in excess of Rules 8 and 9(b).**

The district court pressed Plaintiffs for evidence, before any discovery was had, of specific hours billed connected to proof of each specific hour not being worked, in order to avoid Rule 12(b)(6) dismissal. The

Fifth Circuit panel pressed Plaintiffs on the same point at oral argument. Requiring such proof at the pleading stage in a civil action goes far beyond any civil pleading standard known, and specifically is in conflict with *Bell Atlantic Corp. v. Twombly*⁵ and *Erickson v. Pardus*⁶ and the explication in those opinions of pleading standards under F.R.Civ.P. Rules 8 and 9(b).

As *civil* litigants, non-governmental civil RICO plaintiffs have no access to grand juries, search warrants, government investigators, or battering rams and seizures available to the government in building a RICO case. The availability of any evidence to attach to a civil RICO complaint is a matter of serendipity, and the availability of enough evidence to equal an indictment or bill of information before any discovery is had is so unlikely as to almost render the civil RICO remedy unavailable to non-governmental litigants in the Fifth Circuit.

The district court in the instant case (at R.657-58, Tr.42:25-43:9) made clear that the *Bell Atlantic Corp. v. Twombly* plausibility standard for Rule 12(b)(6) dismissal was being applied. The Fifth Circuit, in footnote 2, opined that Plaintiffs did not even meet the more liberal *Conley* standard, and that the applicability of the plausibility standard to RICO cases remains undecided.

B. The Fifth Circuit's demurring to apply the plausibility standard here conflicts with the Seventh Circuit.

The Seventh Circuit considered the civil RICO pleading standard in light of *Bell Atlantic Corp. v.*

5. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

6. *Erickson v. Pardus*, 551 U.S. 89 (2007) (*per curiam*).

Twombly in *Limestone Development Corp. v. Village of Lemont, Ill.*⁷, holding that, for complaints involving complex litigation such as a RICO claim, a fuller set of factual allegations may be necessary to show that relief is plausible:

Bell Atlantic must not be overread. The Court denied “requir[ing] heightened fact pleading of specifics,” 127 S.Ct. at 1974; “a complaint ... does not need detailed factual allegations.” *Id.* at 1964. [...] A complaint must always, however, allege “enough facts to state a claim to relief that is plausible on its face,” *Bell Atlantic Corp. v. Twombly, supra*, 127 S.Ct. at 1974, and how many facts are enough will depend on the type of case. In a complex antitrust or RICO case a fuller set of factual allegations than found in the sample complaints in the civil rules’ Appendix of Forms may be necessary to show that the plaintiffs claim is not “largely groundless.” *Phillips v. County of Allegheny*, 515 F.3d 224, 231-32 (3d Cir. 2008). If discovery is likely to be more than usually costly, the complaint must include as much factual detail and argument as may be required to show that the plaintiff has a plausible claim. *Iqbal v. Hasty*, 490 F.3d 143, 157-58 (2d Cir. 2007).⁸

The Fifth Circuit’s reluctance to recognize the Supreme Court’s plausibility standard as applying to civil RICO cases, preferring instead to analyze civil RICO complaints in comparison to criminal RICO

7. *Limestone Development Corp. v. Village of Lemont, Ill.*, 07-1438 (7th Cir. 4/1/2008) 520 F.3d 797.

8. *Limestone Development*, 520 F.3d at 803-04.

complaints, is in conflict with the Seventh Circuit's clear endorsement of the plausibility standard.

II. The Fifth Circuit's dismissal of a civil RICO action alleging mail and wire fraud, which additionally alleged violations of rules and state law regulating attorneys, conflicts with the civil RICO statutes, the decisions of this Court, and other circuit courts.

A. The Fifth Circuit's decision here conflicts with part III-C of *Bridge*, and the consistent line of prior decisions referenced therein.

The unanimous U.S. Supreme Court decision in *Bridge v. Phoenix Bond & Indemnity Co.*⁹ held that reliance is not a required element of a RICO claim predicated on mail fraud, and also addressed the policy argument whether extra-statutory limitations should be read into the RICO statute because civil RICO over-federalizes state law causes of action. The unanimous Supreme Court rejected that policy argument and pointed out that the Court has consistently rejected that argument since at least 1985, writing "[w]e have repeatedly refused to adopt narrowing constructions of RICO in order to make it conform to a preconceived notion of what Congress intended to proscribe", the unanimous Court re-affirmed for today what it has been consistently affirming since at least 1985: Congress wrote the civil RICO statutes to have a broad reach, and only Congress can change the statutes.¹⁰

The Fifth Circuit here has devised a *sui generis*,

9. *Bridge v. Phoenix Bond & Indemnity Co.*, 553 U. S. ____ (2008).

10. *Bridge*, 553 U. S. ____ (2008), slip opinion part "III-C" at 19-21.

loosely-defined pleading standard that almost all civil RICO plaintiffs— lacking governmental investigative and compulsory powers— will fail to meet. The Fifth Circuit's pleading standard functions as an extra-statutory limitation on the availability of civil RICO, as proscribed by the unanimous Supreme Court.

B. The Fifth Circuit's holding that an alleged civil RICO violation is categorically not actionable where it also implicates rules regulating attorneys conflicts with the Eighth Circuit.

The Fifth Circuit position in the instant case conflicts with the Eighth Circuit's *Handeen v. Lemaire*¹¹, holding that "[b]ehavior prohibited by §1962(c) will violate RICO regardless of the person to whom it may be attributed, and we will not shrink from finding an attorney liable when he crosses the line between traditional rendition of legal services and active participation in directing the enterprise. The polestar is the activity in question, not the defendant's status"¹².

III. The Fifth Circuit's rule formulaically justifying denial of amendment as of right conflicts with Rule 15(a), the decisions of this Court, and other circuit courts.

Under the well-settled teaching of *Foman v. Davis*¹³, federal courts in most of the nation observe a bias in favor of amendment written in F.R.Civ.P. Rule 15(a)— especially for a first amendment before responsive pleading, which is considered to be an amendment as

11. *Handeen v. Lemaire*, 112 F.3d 1339 (8th Cir. 1997).

12. *Handeen*, 112 F.3d at 1349.

13. *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230 (1962).

of right or as a matter of course. Relying on its prior decision¹⁴ that affirmed denial of amendment where the district court *did* weigh and consider the factors of undue delay, dilatory motive, undue prejudice, repeated failure, and futility, the Fifth Circuit here affirms denial of a first amendment as of (former) right where the district court *did not* consider the above factors, but merely formulaically and automatically abrogated the right to amend because this was a civil RICO case in which a RICO Case Statement and an opposition memorandum had been filed.

Regarding amendment, the Fifth Circuit here is in conflict with Rule 15(a) and with *Foman v. Davis*.

A. The Fifth Circuit's opinion here has already been used as precedent for denial of amendment in a later decision.

The decision under scrutiny here has already been demonstrated to have importance beyond the mere denial of these three Plaintiffs' opportunity to present their case, because this decision has already been cited as precedent by a different panel of the same Fifth Circuit in justifying denial of leave to amend.¹⁵

The instant case marks the turning point where the Fifth Circuit dispenses with any pretense of analyzing delay, prejudice, futility, etc., and creates the judge-made rule that if one files a RICO case statement and an opposition to dismissal, as one must, then the former right under Rule 15(a) to make a first amendment before responsive pleading is forfeit.

14. *Price v. Pinnacle Brands, Inc.*, 97-10623 (5th Cir. 4/22/1998) 138 F.3d 602, 608.

15. *The Torch Liquidating Trust v. Stockstill*, 08-30404 (5th Cir. 2/23/2009).

B. The Fifth Circuit's rule here conflicts with the Seventh and Third and, apparently, with all other circuits.

The Fifth Circuit's rule here is inconsistent with the Seventh Circuit, which recently made clear that an order dismissing the original complaint normally does not eliminate the plaintiff's right to amend once as a matter of right, and observed that a district court's entering final judgment at the same time as granting a motion to dismiss (as happened in the instant case) constituted a loss of such right to amend.¹⁶

The Third Circuit's research for a 2006 decision found that "only one appellate court uncovered in our research has approved of denial of leave to amend based on a delay of less than one year"¹⁷, with that one court being the Fifth Circuit.

IV. Categorical dismissal of civil RICO actions against attorneys justified by reference to state rules or state laws regulating attorneys will lead to different results under different states' rules and laws.

Federal civil RICO actions based on federal mail and wire fraud statutes should have uniform application throughout the nation. The Fifth Circuit's treatment of a civil RICO mail and wire fraud action as being "at worst violations of the rules of professional responsibility" loosely implies that the wrongs in this instant case have an appropriate alternate remedy in Louisiana. The Fifth Circuit's approach would have

16. *Foster v. Deluca*, 05-1491 (7th Cir. 9/29/2008) 545 F.3d 582 (citing a number of prior Seventh Circuit cases).

17. *Arthur v. Maersk, Inc.*, 04-3670 (3rd Cir. 1/13/2006) 434 F.3d 196, 204.

different results where the wrongs occurred at least in part in other states having other regulatory regimes for attorneys, or having none at all. Ironically, in any future case involving truly nationwide fraud of unquestionably federal concern, the Fifth Circuit's approach would require a complex analysis of possibly all of the states' regulatory regimes, and would still very likely dismiss such a case categorically— simply for being a civil RICO action against an attorney.

CONCLUSION

This Petition for a Writ of Certiorari should be granted.

Respectfully submitted:

Mark Edw. Andrews

Counsel of Record

Andrews Arts & Sciences Law, LLC

7104 Coliseum St.

New Orleans, LA 70118-4818

504-865-8191

mea@mealaw.com

Attorney for Petitioners

**APPENDIX TO
PETITION FOR WRIT OF CERTIORARI**

Appendix A, Circuit Court Opinion	1a
Appendix B, District Court Order	6a
Appendix C, District Court Judgment	7a
Appendix D, RICO Standing Order	8a
Appendix E, Relevant Statutes	12a

APPENDIX A, CIRCUIT COURT OPINION

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 08-30364

Filed January 20, 2009
Charles R. Fulbruge III, Clerk

LESLEY SIMMONS ST. GERMAIN; HILLARY
ROSE HILLYER; MELISSA BRANIGHAN
LUMINAIS

Plaintiffs-Appellants

v.

D DOUGLAS HOWARD, JR.; D DOUGLAS
HOWARD, JR & ASSOCIATES; HOWARD & REED,
ATTORNEY AT LAW

Defendants-Appellees

Appeal from the United States District Court
Eastern District of Louisiana

Before GARWOOD, GARZA, and OWEN, Circuit
Judges.

PER CURIAM:

Plaintiff-Appellants Leslie St. Germain et al. ("Appellants") appeal the district court's dismissal of their civil Racketeer Influenced and Corrupt Organizations ("RICO") suit against Defendants-Appellees D. Douglas Howard and the two law firms with which he is affiliated ("Appellees"). Appellants

alleged violations of RICO and various state law claims arising out of Appellees' prior legal representation of Appellants. The district court dismissed Appellants' RICO claims with prejudice under FED. R. CIV. P. 12(b)(6), and dismissed the pendent state law claims without prejudice pursuant to its jurisdiction under 28 U.S.C. § 1367. The district court also denied Appellants leave to amend their complaint under Fed. R. Civ. P. 15(a) and taxed costs to Appellants.

We review de novo the dismissal of a complaint under FED. R. CIV. P. 12(b)(6), *Elsensohn v. St. Tammany Parish Sheriff's Office*, 530 F.3d 368, 371 (5th Cir. 2008), and review for abuse of discretion the district court's refusal to allow a party to amend its pleadings, taxing of costs to a party, and dismissal of pendent state law claims. See *Robertson v. Plano City*, 70 F.3d 21, 22 (5th Cir. 1995); 28 U.S.C. § 1367(c); *McLeod, Alexander, Powell & Appfel, P.C. v. Quarles*, 894 F.2d 1482, 1488 (5th Cir. 1990).

The district court did not err in dismissing Appellants' RICO claims under Rule 12(b)(6). Claims under RICO, 18 U.S.C. § 1962, have three common elements: "(1) a person who engages in (2) a pattern of racketeering activity, (3) connected to the acquisition, establishment, conduct, or control of an enterprise." *Abraham v. Singh*, 480 F.3d 351, 355 (5th Cir. 2007). A pattern of racketeering activity consists of two or more predicate criminal acts that are (1) related and (2) amount to or pose a threat of continued criminal activity. *Id.* The predicate acts can be either state or federal crimes. In their complaint, Appellants alleged that the predicate acts committed by Appellees were mail and wire fraud. However, the district court found, and Appellants acknowledged, that the "patterns of racketeering activity" they allege are at worst violations

of the rules of professional responsibility.¹ Because Appellants have not alleged the requisite predicate *criminal acts* under RICO, they have not met the pleading standard of Rule 12(b)(6).²

In holding that Appellants were required to demonstrate detrimental reliance when alleging injuries that resulted from fraud under RICO, however, the district court relied on Fifth Circuit precedent that is no longer good law. See *Summit Props. Inc. v. Hoechst Celanese Corp.*, 214 F.3d 556, 562 (5th Cir. 2008). The Supreme Court recently held that no reliance requirement exists for civil causes of action under RICO for victims of mail fraud. *Bridge v. Phoenix*

¹The allegedly fraudulent acts that are at the heart of Appellants' RICO case involve the following: (1) violation by Appellees of multiple provisions of the Louisiana Rules of Professional Conduct; (2) Appellees using "multiple business identities" in the course of their legal representation of Appellants, as evidenced by billing statements sent from "Howard and Reed" and "Howard, Reed and Taylor, Attorneys at Law" (despite the existence of a contractual arrangement solely between "D. Douglas Howard and Associates" and Appellants); (3) Appellees charging Appellants non-refundable minimum fees in advance, and performing unauthorized and/or overbilled work; (4) Appellees engaging in unauthorized sharing of fees with parties not identified in the contract between Appellees and Appellants.

²The parties dispute which standard of pleading applies to civil RICO claims in this case. Appellants argue that the pleading standard articulated in the Supreme Court's decision in *Bell Atlantic v. Twombly*, 127 S.Ct. 1955, 1974 (2007), is applicable to civil RICO claims. *Twombly* jettisoned the minimum notice pleading requirement of *Conley v. Gibson*, 355 U.S. 41 (1957), and instead required that a complaint allege enough facts to state a claim that is plausible on its face. *In re Katrina Canal Breaches Litigation*, 495 F.3d 191, 205 (5th Cir. 2007). Appellees contend that *Twombly* is not relevant to civil RICO actions. Because Appellants do not meet either the more liberal *Conley* standard or the *Twombly* plausibility standard, we do not need to decide in this instance whether *Twombly* applies in the RICO context.

Bond & Indem. Co., 128 S.Ct. 2131, 2139-40 (2008). Thus, to the extent that our prior cases are in conflict with *Bridge*, they are overruled.

Notwithstanding the fact that reliance is no longer required to be pled, Appellants have still not sufficiently pled the predicate acts of mail and wire fraud, and are unable to show that they were injured by a violation of RICO. The district court's dismissal of the RICO claims under Rule 12(b)(6) was therefore ultimately proper. For this reason, the district court also did not err in dismissing Appellants' state law claims. The district court has discretion to dismiss pendent state law claims, and may decline to exercise supplemental jurisdiction over such claims where it has dismissed claims over which it had original jurisdiction. 28 U.S.C. § 1367(c).

Finally, the district court did not commit error in denying Appellants the opportunity to amend their complaint and in taxing costs to Appellants. Appellants had several opportunities to state their best case. See *Price v. Pinnacle Brands, Inc.*, 138 F.3d 602, 608 (5th Cir. 1998) (finding no abuse of discretion in district court's denial of opportunity to amend when plaintiffs had already filed their original complaint, their RICO case statement, and their response to defendants' Rule 12(b)(6) motion). The district court also did not abuse its considerable discretion in taxing costs to Appellants. FED. R. CIV. P. 54(d); see *McLeod, Alexander, Powel & Apffel, P.C. v. Quarles*, 894 F.2d 1482, 1488 (5th Cir. 1990).

Appellees have moved under Rule 38 for sanctions and double costs and attorney's fees to be assessed against Appellants. The Court may assess sanctions and single or double costs and attorney's fees against a party if their appeal is deemed frivolous. Under Rule 38, "a frivolous appeal is an appeal in which 'the result

is obvious or the arguments of error are wholly without merit.” *Buck v. United States*, 967 F.2d 1060, 1062 (5th Cir.1992). Though this is a close case given that Appellants clearly have not presented a cognizable civil RICO claim, we decline to assess sanctions and double costs and attorney’s fees against Appellants.

For the foregoing reasons, we AFFIRM the judgment of the district court, and DENY the motion for sanctions and double costs and attorney’s fees.

APPENDIX B, DISTRICT COURT ORDER

MINUTE ENTRY

BARBIER, J.

MARCH 5, 2008

JS-10: 1hr.,30 mins.

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA**

LESLEY SIMMONS ST. GERMAIN, ET AL
VERSUS

D. DOUGLAS HOWARD, ET AL

CIVIL ACTION
NUMBER: 07-9040
SECTION: J

COURTROOM DEPUTY: EILEEN STENSRUD
COURT REPORTER: CATHY PEPPER

REVISED MINUTES - March 6, 2008
WEDNESDAY, MARCH 5, 2008 9:30 A.M.
JUDGE CARL J. BARBIER PRESIDING

DEFENDANT'S MOTION TO DISMISS (15)

Argued.

ORDERED GRANTED in part. The federal claims are dismissed with prejudice; the pendant state court claims are dismissed without prejudice.

ORDERED DENIED in part as to the motion for sanctions; court costs are to be paid by the plaintiffs. Plaintiff's motion to amend the complaint: ORDERED DENIED.

Judgment to be issued.

ATTORNEYS: Mark Andrews, Esq., for plaintiff
Joanne Rinardo, Atty at Law, for defendant

APPENDIX C, DISTRICT COURT JUDGMENT

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA**

LESLEY SIMMONS ST. GERMAIN, ET AL

VERSUS

D. DOUGLAS HOWARD, ET AL

**CIVIL ACTION
NUMBER: 07-9040
SECTION: J**

JUDGMENT

Considering the court's ruling, rendered in open court on March 5, 2008,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendants, D. Douglas Howard, Jr., D. Douglas Howard, Jr. & Associates and Howard & Reed, Attorney at Law, and against plaintiffs, Lesley Simmons St. Germain, Hillary Rose Hillyer and Melissa Branighan Luminais, dismissing plaintiffs' federal Racketeer Influenced and Corrupt Organizations Act ("RICO") claim with prejudice and plaintiffs' pendant state law claims without prejudice, at plaintiffs' cost.

Dated at New Orleans, LA., this 6th day of MARCH, 2008.

s/ Carl J. Barbier
UNITED STATES
DISTRICT JUDGE

APPENDIX D, RICO STANDING ORDER**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA**

ST. GERMAIN, ET AL
VERSUS
HOWARD, ET AL

CIVIL ACTION
NO. 07-9040
SECTION: "J"

RICO STANDING ORDER

This case contains a Civil RICO claim, filed in this Court pursuant to 18 U.S.C. Sections 1961-1968. This Order has been designed to establish a uniform and efficient procedure for deciding RICO cases.

The plaintiff(s) shall file within 20 days of the entry of this order a RICO case statement (an original and one (1) copy). The statement shall include the facts plaintiffs rely upon to initiate this RICO complaint as a result of the "reasonable inquiry" required by Federal Rule of Civil Procedure II. In particular, the statement shall be in a form which uses the numbers and letters set forth below, unless filed as part of an amended and restated complaint (in which latter case, the allegations of the amended and restated complaint shall reasonably follow the organization set out below) and shall state in detail and with specificity the following information:

1. State whether the alleged unlawful conduct is in violation of 18 U.S.C. Sections 1962(a), (b), (c), and/or (d). If you allege violations of more than one Section 1962 subsection, treat each as a separate RICO claim.
2. List each defendant and state the alleged misconduct and basis of liability of each defendant.
3. List the alleged wrongdoers, other than the defendants listed above, and state the alleged misconduct of each wrongdoer.

4. List the alleged victims and state how each victim allegedly was injured.

5. Describe in detail the pattern of racketeering activity or collection of an unlawful debt alleged for each RICO claim. A description of the pattern of racketeering activity shall include the following information:

(a) List the alleged predicate acts and the specific statutes allegedly violated;

(b) Provide the dates of the predicate acts, the participants in the predicate acts and a description of the facts surrounding each predicate act;

(c) If the RICO claim is based upon the predicate offenses of wire fraud, mail fraud, fraud in the sale of securities, or fraud in connection with a case under U.S.C. Title II, the "circumstances constituting fraud or mistake shall be stated with particularity," Fed. R. Civ. P. 9(b). Identify the time, place and contents of the alleged misrepresentation or omissions, and the identity of persons to whom and by whom the alleged misrepresentations or omissions were made;

(d) Describe whether the alleged predicate acts relate to the enterprise as part of a common plan. If so, describe in detail.

6. Describe in detail the alleged enterprise for each RICO claim. A description of the enterprise shall include the following information:

(a) State the names of the individuals, partnerships, corporations, associations or other entities allegedly constituting the enterprise;

(b) Describe the structure, purpose, roles, function and course of conduct of the enterprise;

(c) State whether any defendants are employees, officers or directors of the alleged enterprise;

(d) State whether any defendants are associated with the alleged enterprise, and if so, how;

(e) State whether you allege that the defendants are individuals or entities separate from the alleged enterprise, or that the defendants are the enterprise itself, or members of the enterprise;

(f) If you allege any defendants to be the enterprise itself, or members of the enterprise, explain whether such defendants are perpetrators, passive instruments, or victims of the alleged racketeering activity.

7. State whether you allege and describe in detail how the pattern of racketeering activity and the enterprise are separate or have merged into one entity.

8. Describe the alleged relationship between the activities of the enterprise and the pattern of racketeering activity. Discuss how the racketeering activity differs from the usual and daily activities of the enterprise, if at all.

9. Describe what benefits, if any, the alleged enterprise receives from the alleged pattern of racketeering activity.

10. Describe the effect of the activities of the enterprise on interstate or foreign commerce.

11. If the complaint alleges a violation of 18 U.S.C. Section 1962(a), provide the following information:

(a) State who received the income derived from the pattern of racketeering activity or through the collection of an unlawful debt; and,

(b) Describe the use or investment of such income.

12. If the complaint alleges a violation of 18 U.S.C. Section 1962(b), provide the following information:

(a) Describe in detail the acquisition or maintenance of any interest in or control of the alleged enterprise; and,

(b) State whether the same entity is both the liable "person" and the "enterprise" under Section 1962(b).

13. If the complaint alleges a violation of 18 U.S.C. Section 1962(c), provide the following information:

(a) State who is employed by or associated with the enterprise;

(b) State whether the same entity is both the liable "person" and the "enterprise" under Section 1962(c).

14. If the complaint alleges a violation of 18 U.S.C. Section 1962(d), describe in detail the alleged conspiracy;

15. Describe the alleged injury to business or property;

16. Describe the relationship between the alleged injury and violation of the RICO statute.

17. List the damages sustained by reason of the violation of Section 1962, indicating the amount for which each defendant allegedly is liable.

18. List all other federal causes of action, if any, and provide the relevant statute numbers.

19. List all pendant state claims, if any.

20. Provide any additional information you feel would be helpful to the Court in processing your RICO claim.

This order was adopted by the court en banc at its meeting of June 3, 1987. The court has further directed that it be entered in each RICO case at the time of filing.

LORETTA G. WHYTE, CLERK
By s/ Eileen Stensrud
Deputy Clerk

DATE ISSUED NOVEMBER 27, 2007

APPENDIX E, RELEVANT STATUTES

18 U.S.C. §1961. Definitions

As used in this chapter--

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: [...] section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), [...];

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

[...]

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

[...]

18 U.S.C. §1962. Prohibited activities

[...]

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

18 U.S.C. §1964. Civil remedies

[...]

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

[...]

18 U.S.C. §1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. §1343. Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.

If the violation affects a financial institution, such person shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. §1346. Definition of "scheme or artifice to defraud"

For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.